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Department to hold meeting on rule changes

To provide additional time to review and provide feedback and comments on proposed changes to the Commissioner's Rules, the Department has reopened the record. Below, you will find a list of changes which will be made to the proposed rules as they appeared in the *Arizona Administrative Register*.

The Department will accept additional written comments and meet with interested parties to discuss proposals which concern them at 10 a.m. on Wednesday, Oct. 14, in the third-floor conference room at the Department's Phoenix Office at 2910 N. 44th Street (at Thomas Road).

Please contact the Customer Services Division at 602/468-1414, extension 0, if you plan to attend. Additional meetings will be scheduled if the response to this invitation demonstrates a need for further meetings.

The record must be closed on Dec. 11 to meet the requirements of rule-making process.

Interested parties are welcome to call Cindy Wilkinson at 602/468-1414, extension 145, with questions concerning the proposed rule changes.

The following are the changes to be made to the proposed rule change package which can be viewed on the Department's Web site at www.adre.org/flashpage.html

The rules currently in force can be viewed through the on-line edition of the *Arizona Real Estate Law Book* on the Web at www.adre.org/golawbook.html

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Son of ADRE employee saves his and grandmother's life

Randy Ferrin is 10 years old, too young to drive, too young on paper, that is. But tell that to his grandmother.

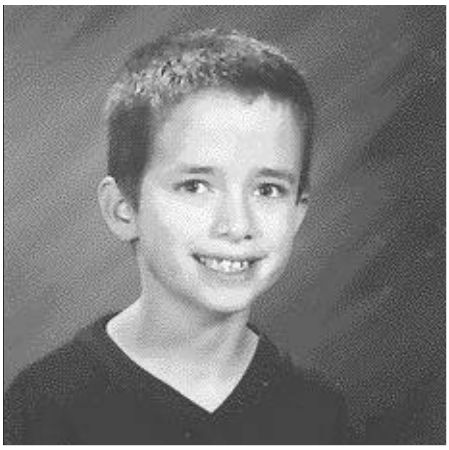
On August 10, grandmother Bonnie Titus, 67, was driving Randy to the hospital because he displayed symptoms of appendicitis. While driving in heavy traffic on 99th Avenue, she suffered a major heart attack.

Randy, who is the son of the Department's Director of Customer Services, Cindy Ferrin, wrested the wheel of the car from his unconscious grandmother's hands and steered it out of the way of an oncoming tractor-trailer rig.

After he swerved to the safety of the side of the road and slowed the car, passersby helped him stop it.

Fortunately, a Southwest ambulance happened by a few minutes later and shortly after, paramedics from the Tolleson Fire Department arrived and managed to resuscitate Randy's grandmother.

On Sept. 3, firefighters arrived at Randy's home amd drove him to their station with flashing lights and the siren running. There, they treated him to a pizza party. The firefighters also honored Randy with a plaque and certificate for his "quick thinking and brave actions." His grandmother proudly attended the ceremony.



Randy Ferrin

"At first, Randy thought it was his fault his grandmother had suffered a heart attack," Cindy Ferrin said, "but the ceremony at the fire station helped convince him it wasn't his fault — that he did the right thing."

The appendicitis attack? False alarm. It was a virus.

The perils of recording an aborted contract

Reprinted from the September 1998 edition of the Arizona Journal of Real Estate & Business *with permission.*
by Jim Eckley

Okay. So it's 4:30 p.m. on a Friday and you just learned that the seller is going to renege on what you consider to be an iron-clad Purchase Agreement and is going sell to someone else this weekend. Visions of how to advise your thoroughly outraged buyer (who will likely blame you if this happens) and, without this really big commission, how to cope with your consequently defaulted alimony payments dance most unpleasantly in your head. Now what? And be careful be-

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Aborted contract

Continued from page 1

fore you answer this one. What you do and say next may cost you your home, car and savings, your license, a criminal charge and more collective misery and grief than you can possibly imagine without being there!

To put a point on it: If your first reaction is to rush to the County Recorder's Office and record the Purchase Agreement or to advise your client to do so, start packing, as this step is likely your first on a slow march to poverty, ignomy—and possibly jail. Why? Because this state takes a very dim view of clouding someone else's title to land if, perchance, you are wrong in your reasons for doing so.

You may think the Purchase Agreement is impregnable, but is it really? At least a hundred sharp local lawyers and probably a dozen or so nitpicky judges stand ready to disagree with you. Perhaps you don't even really think the Purchase Agreement is so great, but you are banking on the likelihood that the seller will want to avoid the legal hassle and will cave in? Brother! Record a document on that basis and pack your toothbrush and a lot of toothpaste for where you will be going. That's not just being wrong. That's being positively tickled about it, to boot. The laughing, usually stops, however, when the Superior Court final gavel comes down —on your life.

So much for garnering your attention. Let's turn to the law for why and start out by restating the proposition that a good lawyer and judge can and will pick your "iron-clad" deal apart, making you look like the dumbest bunny in town. Believe me when I say that it is done all of the time to some very fine and very competent real estate professionals. It's all part of the gamesmanship. Nonetheless, you recorded it or advised your client to record it. The seller and his attorney cry "foul!" Here's how it stacks up:

Complaint Number One: Civil Suit for Filing a False Document: Pursuant to A.R.S. §33-420, a person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes (files it or advises it) a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains a material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.

A.R.S. §33420(A). *Janis v. Spelts*, 153 Ariz. 593, 739 R2d 814 (App. 1987). Those actual damages could be the profits the seller could have made on resale. *Patterson v, Bianco*, 167 ' Ariz. 249, 805 P.2d 1070 (App. 1991).

Okay, but you have piles of money and this is only "small change" to you, hmmmm? Is this the best these wimps can do? No. They can do better. A lot better.

Complaint Number Two: Handcuff City: A person who violates the statute, above, is also guilty of a class I misdemeanor. A.R.S §33-420(E). Heck: Only a year with the County? You can do that standing on your head, right? It only gets better from here if chain gangs are your favorite clubs.

Complaint Number Three: Civil Suit for Wrongful *Lis Pendens*: A.R.S. §12-1191 describes certain documents which could be filed on title as a "notice of pendens." Though these are intended for notices of imminent legal action, the filing of a document wrongfully claiming an interest in land could be deemed as an aborted attempt at such a claim. *Evergreen West, Inc. v. Boyd*, 167 Ariz. 614, 810 P.2d 612 (App. 1991). *Mammoth Cave Production Credit Ass'n v. Gross*, 141 Ariz. 398, 687 P.2d 397 (App. 1984).

One can also be sued for filing a document that is correct in some regards, but incorrect in others as, for instance, one that seemed to suggest in its property description that a claim was asserted in an entire parcel rather just a part thereof, held actionable in *Bianco v. Patterson*, 159 Ariz. 215, 745 P.2d 962 (App. 1989). Yahoo! Are we having fun yet? Not even nearly over!

Complaint Number Four: Civil Suit and Criminal Charge for Wrongful Attempt to Claim or Collect a Debt: The earnest money stated in the Purchase Agreement could be construed as a claim of debt and the recordation as the attempt to secure it like a mortgage. It's neither as a matter of law. *Provident Mut. Building-Loan Ass'n v. Schwertner*, 15 Ariz. 517, 140 P. 495 (1914).

To the extent this is untrue, this is another violation of A.R.S. §33-420(A). See above; It could also be a wrongful debt collection practice under state and federal law. Sure, why not: Civil suit, Jail time. Add it on, suckers! No one can daunt *you*!

Complaint Number Five: Civil Suit for Slander of Title: Publishing anything deemed false (and "incorrect" is deemed false) is separately actionable as a slander of title. *City of Tempe V. Pilot Properties, Inc.*, 22 Ariz.App. 356, 527 P.2d 515 (App. 1974). The claim may be for consequential and punitive damages of any amount. *Barnett v. Hitching Post Lodge, Inc.*, 16 Ariz.App. 147, 492 P.2d 27 (App. 1971).

Well, at this point you are already broke three times over and in jail, so why not just a little more excitement? After all, it will be your last for some time.

Complaint Number Six: Civil Suit for Civil Racketeering: A.R.S. § 13-2301 (D)(4) defines "racketeering" as any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving (as of April 19, 1994) intentional or reckless false statements or publications concerning land for sale, resale of realty with intent to defraud, or a scheme or artifice to defraud.

A.R.S. §13-2310 further discusses "fraudulent schemes": Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains (or attempts to attain) any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.

A.R.S. §13-2314(A) provides for civil liability for racketeering. Now you're a racketeer! So a few more years in the Crowbar Hotel, but this time it's state prison rather than the County jail. The food is better but your bunkmate is a lot scarier—and hairier.

Complaint Number Seven: Hey! A Couple More Years with a Tin Cup!: Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent

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Jerry Holt

News From The Commissioner

There has been a great deal of interest in the Department's proposed changes to the Commissioner's Rules. As a result of input from industry groups and concerned citizens, we have modified some of the proposed changes as you will read in the story on page 1.

Some have indicated they have not had enough time to review the proposal, and others were not able to attend the public hearings held in September in Tucson and Phoenix.

That is why we have taken the unusual step of holding a public meeting at the Department's Phoenix office on Wednesday, October 14, beginning at 10 a.m., to provide interested parties one more opportunity to comment on the proposed changes.

I must emphasize that this is not a "public hearing" in the context of the rule-making process. Nonetheless,we will carefully consider the input we receive at this meeting.

I was saddened to hear of the death of Rex Denham who founded and operated the Northwestern School of Real Estate in Bullhead City since 1987. Many of you in Mohave County received your prelicensure and continuing education training from Rex.

He was a "gentleman" in every sense of the word and the industry will miss him.

I will be traveling to Nogales on October 9th to attend a meeting of the Arizona-Mexico Commission in which we hope to finalize a proposal to the Sonoran Congress for the regulation of the real estate industry in Sonora. As you may have read before in this column, the Sonoran government wants to establish a real estate regulatory agency patterned on the Arizona Department of Real Estate. The plan has been a long time coming, but should go before the Sonoran Congress on October 15.

The Tucson Association of Realtors® will present a mock fair-housing trial at the Tucson Convention Center on Wednesday, October 7, from 8:30 a.m. until noon. I will play the part of a real estate broker who, among others, allegedly violated provisions of the Arizona Fair Housing Act. I will be represented in the trial by former Assistant Attorney General Richard Martinez. The prosecuting attorney will be played by Phoenix attorney Chris Combs. Presiding at the trial will be Pima County Superior Court Judge Jon Trachta.

The scenario: A woman who had operated group homes in other communities made an offer on a $400,000 home in Tucson, but did not disclose what she planned to use the home for. She was present when a property inspector looked at the home, and from questions she asked about modifying the property, he realized she planned to operate a group home.

The property inspector relayed this information to the seller's broker, and the seller and his broker became fearful that a group home in the neighborhood would evoke the ire of other property owners and have an adverse effect on property values.

They then conspired to circumvent the sale by accepting a later, and lower offer for the property. As the seller's broker, I'm probably going to be found guilty, but we'll leave that up to the jury. Be sure to attend if you can.

pretenses, representations, promises or material omissions is guilty of a class 2 felony by reason of A.R.S. § 13-2310, which is chargeable or indictable under A.R.S. § 13-2310 and § 44-1481. *Garvin v. Greenbank*, 856 F.2d 1392, 1396 (9th Cir. 1988); Daggett, 152 Ariz. at 564.

Any participation in the act, even if one is not the one who actually committed it, is actionable. *State v. Haas*, 138 Ariz. 413, 418, 675 P.2d 673 (1983). Not only is your bunkmate scarier, you'll be with him a lot longer!

Complaint Number Eight: Civil Suit and Leg Irons for Extortion: A.R.S. §13-1804 provides that one who attempts to obtain a gain by a threat to cause damage to property or by performing or causing to be performed any other act which is calculated to harm the other person in their wealth or financial condition to the gain of the one doing it is guilty of theft by extortion. Now we have a class 4 felony. By the time you're out, *you* will be the hairiest and scariest one!

Complaint Number Nine: Civil Suit for Malpractice: With you gone until sometime in the mid-2000s, the client will team up with your spouse in a settlement, your spouse will reveal the bank account in Michigan you kept in grandpa's name and where the hidden money is out in the garage, upon which the client will then execute his malpractice judgement and they'll both elope with it.

Complaint Number Ten: The Real Estate Department Shows Up With A Customized Straight-jacket: You just blew right through A.R.S. 32-2153(A) and (B) and A.A.C. R4-28-1101 of the licensure laws and rules at about 300 miles an hour. You're out of control! It's safe to surmise that your license will become rather abruptly homeless.

I think the point has been made. Made moreover when the Maricopa County DA has, within the last month, amid a rising tide of such filings, publicly pledged that he is *anxious* to prosecute fraudulent filings wherever reported, and members of the legislature have avowed specifically that this area will be revisited in the next session to tighten it up (presuming financial ruination and a two-decade stretch is not tight enough, already?!).

With the temptation to file the Purchase Agreement coming so often in this hard-ball market and the civil, criminal and licensure risk if it doesn't stick so utterly devastating, one has to think of the "Dirty Harry" challenge the next time one is tempted to visit the

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1998 Schedule of Broker Audit Clinics

A.R.S. § 32-2136 requires all newly licensed real estate brokers to attend a Broker Audit Clinic presented by the Department within 90 days of issuance of their original broker's license. *Effective July 21, 1997, all designated real estate brokers must also attend a Broker Audit Clinic within 90 days after becoming a designated broker unless the broker has attended an audit clinic during the broker's current licensing period.* All designated brokers shall attend a broker audit clinic once during every four-year period after their initial attendance.

Seating is limited and reservations are required. To make a reservation for a Phoenix clinic, call the Department's Customer Services Division at (602) 468-1414, extension 100. In Tucson, call (520) 628-6940. Those who fail to make reservations will be turned away if seating is not available. Brokers who attend will receive three hours of continuing education credit in the category of Commissioner's Rules.

The following is the schedule of Clinics to be offered in Phoenix and Tucson during the remainder of 1998 and in 1999. Additional clinics may be scheduled from time to time at other locations in Phoenix and in rural areas.

PHOENIX Industrial Commission Auditorium 800 W. Washington	TUCSON State Office Building 400 W. Congress Room 222
1998 **Noon to 3 p.m.**	**1998** **8:30 a.m. to 11:30 a.m.**
October 23	October 22
November 20	November 19
December 18	December 17
1999 **1 p.m. to 4 p.m.**	**1999** **1 p.m. to 4 p.m.**
January 21	January 20
February 18	February 17
March 18	March 17
April 15	April 21
May 20	May 19
June 17	June 16
July 15	July 14
August 19	August 18
September 16	September 15
October 21	October 20
November 18	November 17
December 16	December 15

A Broker Audit Clinic will be offered in the Show Low area on October 14. For information call Michael Aroner, White Mountain Association of Realtors,® at 520/537-1107.

The mission of the
Arizona Department of Real Estate
is to safeguard and promote the public interest
through timely and capable assistance,
fair and balanced regulation,
and sound and effective education.

ADMINISTRATIVE ACTIONS

LICENSE SUSPENSIONS

H-1945
Consent order of Tracy A. Beggs
Sedona
DATE OF ORDER: September 9, 1998
FINDINGS OF FACT: Respondent submitted an original application for a real estate salesperson's license in April 1996. The Department issued the license.

Subsequent to approving Respondent's application, the Department learned that he had been convicted of several criminal offenses (all misdemeanors) between 1985 and 1988, including Possession of Marijuana, Prostitution, Battery, Disorderly Conduct and Trespass After Warning. Respondent failed to disclose any of these convictions in his license application.
VIOLATIONS: Respondent procured or attempted to procure a license by filing an original application which was false or misleading in violation of A.R.S. § 32-2153(B)(1). He made substantial misrepresentations in violation of A.R.S. § 32-2153(B)(3). His conduct shows he is not a person of honesty, truthfulness and good character pursuant to A.R.S. § 32-2153(B)(7).
DISPOSITION: Respondent's real estate salesperson's license is suspended for one year to commence five days from the date of this order. Respondent to pay a civil penalty in the amount of $2,000.

CONSENT ORDERS

H-1961
Raymond W. Gobea and Primevest Group, Inc.
Tucson
DATE OF ORDER: August 2, 1998
FINDINGS OF FACT: Gobea was issued an original real estate broker's license on February 1990. That license expires July 31, 1999. At all time material to this matter, Gobea was the designated broker for Primevest Group, Inc.

Primevest, a corporation, was issued an original real estate broker's license in July 1993. That license expires July 31, 1999.

Colleen Schull was the office manager at Primevest during all times material to this matter. Schull is not licensed as a real estate salesperson or broker.

In March 1998, pursuant to a complaint that Primevest's property management trust account was not being handled properly a Department investigator went to Primevest's offices and asked to see the property management records.

After the visit, the Department was advised by Gobea's attorney that an audit of Primevest's trust account would reveal a substantial shortage. Gobea, through his attorney, asked that the Department allow an independent audit of the account before the Department's audit. The Department agreed, but the independent audit was not performed before the deadline set by the Department.

Information provided by Gobea reveals that he entered into an option agreement for a costly Nevada investment which he partly funded through a second mortgage on his office building.

He was preoccupied by his interest with the Nevada investment, spent increasing amounts of time out-of-state, did not regularly contact Schull and was unavailable to her and his office for extended periods of time, during which Schull was instructed by Gobea to handle any matters which arose.

He neglected his responsibilities as designated broker for Primevest and entrusted Schull, an unlicensed person, with management of approximately 70 single-family homes managed by Primevest. When there was insufficient money in the operating account, Schull used money from the trust account to pay salaries, electric bills and other expenses.

Upon learning of Schull's actions and of the shortage in the trust account, Gobea used the names of several fictitious maintenance companies, and hired his brother and others to perform maintenance on properties managed by Primevest. At Gobea's direction, Schull billed property owners' accounts for substantial maintenance fees so that Gobea could recover some of the trust account shortage.

Numerous checks written to the maintenance companies were either not recorded in the check register or were recorded for less than the amount of the check.

Between May 1996 and February 1998, Gobea sold some real property he personally owned and deposited more than $26,000 into the trust account to reduce the shortage.

An April 1998 Department audit of the trust account revealed a shortage of approximately $67,000.

On May 15, 1998, Gobea surrendered Respondents' real estate broker's licenses to the Department and ceased all real estate sales and property management activity. Gobea has provided documents that show that as of May 1998, he and Primevest no longer own any interest in the real estate and property management business they had operated in Arizona. The interests were sold to a third-party prior to entry into this Consent Order.
VIOLATIONS: Respondents used money entrusted to them for other than its intended purpose, in violation of A.R.S. § 32-2151(B)(1). Respondents did not fulfill their fiduciary duties to their clients, nor deal fairly with all parties to a transaction within the meaning of A.A.C. R4-28-1101(A), in violation of A.R.S. § 32-2153(A)(3).

Gobea failed to exercise reasonable supervision over the activities of salespersons, associate brokers or others under Primevest's employ, and failed to exercise reasonable supervision and control over the activities for which a license is required of Primevest, within the meaning of A.R.S. § 32-2153(A)(21).

Gobea commingled with his own money funds entrusted to him by property owners and tenants, or converted those monies for his own use, in violation of A.R.S. § 32-2153(A)(16). Respondents' reliance on Schull in Gobea's absence does not lessen Respondents' responsibility or liability for any monies handled, pursuant to A.R.S. § 32-2174(C).

Gobea demonstrated negligence in the conduct of real estate and as designated broker for Primevest, in violation of A.R.S. § 32-2153(A)(22), by allowing an unlicensed person with little or no knowledge of real estate laws and rules to manage Primevest's brokerage activities without supervision.

Gobea's own participation in and allowing his brother's involvement in performing maintenance work on properties owned by Primevest's clients without disclosing such participation and involvement to the property owners shows that Gobea is not a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).
DISPOSITION: Respondents' real estate broker's licenses are revoked. Respondents shall not reapply for an Arizona real estate license for five years or more from the date of entry of this order.

Respondents Gobea and Primevest, jointly and severally, to pay a civil penalty in the amount of $2,000.

H-1953
In the matter of Gary L. Miller, dba Cochise RV Resort, and in the matter of the membership camping broker's license of Kevin J. Bibeau, dba Kevin Bibeau Campground Sales.
Hauchuca City
DATE OF ORDER: August 17, 1998
FINDINGS OF FACT: Miller does business as, and is president of, Cochise RV Resort, a recreational vehicle membership campground near Hauchuca City. In October 1992, Miller began selling memberships to the campground. Shortly thereafter, Cochise RV became a licensee of Camp Coast to Coast, Inc. As a Coast to Coast licensee, Cochise RV was authorized to sell the Coast to Coast program as an ancillary service to members of the campground.

In April 1994, Cochise RV became a licensee of Resort Parks International (RPI). As a licensee, Cochise RV was authorized to sell the RPI program as an ancillary service to membership at the campground.

Kevin J. Bibeau is presently, and was at all material times, licensed as a self-employed membership-camping broker, dba Kevin Bibeau Campground Sales, in Arizona. That license expires October 31, 1998.

To promote sales of Cochise RV memberships, Miller and Bibeau agreed that Bibeau would assume the title of General Sales Manager of Cochise RV and as such, direct all marketing and sales. Bibeau authored all sales and promotional materials, including telemarketing scripts.

At all time material to this complaint, Miller directed and managed the actions of Cochise RV and those of its employees and independent contractors. Miller approved all promotional, telemarketing and sales actions that Bibeau and Choice Camping engaged in on behalf of Cochise RV.

Between April 1996 and March 1997, Miller and Bibeau hired a telemarketing manager and a staff of four telemarketers to promote the sale of campground memberships. Neither the telemarketing manager nor the telemarketing staff were licensed by the Department.

The telemarketing manager was paid a salary of $1,500 per month and a monthly commission for each completed park tour that the telemarketing staff booked for Cochise RV.

The members of the telemarketing staff were paid $5 per hour and commissions for the park tours they booked and a percentage of any sales of campground memberships that resulted from the tours.

VIOLATIONS: Bibeau employed unlicensed salespersons to promote campground sales in violation of A.R.S. §§ 32-2153(A)(6) and 32-2155(A). Bibeau paid commissions in violation of A.R.S. § 32-2153(A)(10). Bibeau demonstrated negligence in performing acts for which a license is required in violation of A.R.S. § 32-2153(A)(22).

Miller paid commissions to unlicensed persons acting as brokers in violation of A.R.S. § 32-2155(B). Miller has acted in the capacity of a membership camping broker or salesperson without a license and otherwise complying with the provisions of Arizona Revised Statutes, Title 32, Chapter 20, in violation of A.R.S. § 32-2122(B). Miller failed to comply with provisions of Arizona Revised Statutes, Title 32, Chapter 20, in violation of A.R.S. § 32-2198.08(A)(2).

DISPOSITION: Bibeau individually, and dba Kevin Bibeau Campground Sales, to pay a civil penalty in the amount of $2,000.

Miller dba Cochise RV Resort, his agents, servants, employees, assignees and successors shall cease and desist from any violation of the membership camping laws of this state.

H-1947

Consent order of Lee Alice Rankin in the matter of the real estate salesperson's licenses of Lee Alice Rankin and Lee Jane Hunter, aka Avalee Jane Hunter Chandler

DATE OF ORDER: September 2, 1998

FINDINGS OF FACT: Rankin was issued a real estate salesperson's license in August 1995. That license expired August 31, 1997. At all times material to this matter, Rankin was employed by JAD Realty, Inc., dba Nu-Way Realty, as a salesperson.

Hunter was issued a real estate salesperson's license in September 1993. That license expired September 30, 1997. At all time material to this matter, Hunter was also employed by Nu-Way Realty as a salesperson, but at a different branch office.

John W. Hopkins was appointed designated broker of Nu-Way Realty in February 1992. At all time material to this matter, Hopkins was the designated broker for Nu-Way Realty.

On September 7, 1995, Rankin, on behalf of Nu-Way Realty, listed for sale a home on 70th Avenue in Phoenix owned by Steven and Pam Kobernick. The home was identified as a "no-qualify" listing at a price of $69,000.

On October 24, 1995, Hunter prepared a purchase contract and rental application agreement for the home from Regis and Kassandra Johnson to purchase the home. The offer was for $67,000 with $700 down as earnest money/first month's rent (the first check). Hunter gave the agreements to Rankin to present to the seller.

On October 25, 1995, Rankin presented the purchase/lease agreements to the seller who accepted both offers. That same day, Rankin returned the accepted offers to Hunter.

The original date for possession by the buyer was November 10, 1995. Within a few days of the seller's acceptance of the agreements, however, the buyer requested an earlier move-in date of October 30.

Through Rankin, the seller verbally agreed and on October 30, the buyer took possession of the home.

On January 10, 1996, the seller contacted Hopkins for an update on the transaction and because the buyer was not making timely rent payments. Hopkins was unable to find any record of the transaction in Nu-Way Realty's files and contacted Hunter. Hunter located the purchase/lease agreements in the file cabinet and gave them to Hopkins.

Upon receipt and review of the agreements and learning that the first check from the buyer would not be honored, Hopkins instructed Hunter to obtain replacement funds from the buyer. With the agreement of the seller and buyer, on January 10, Hopkins prepared an addendum to the contract to reflect the parties' stipulation as to the amount of rent past due.

The check written by the buyer to Nu-Way Realty as replacement for the first check was not honored by the bank, nor was the check the buyer gave to the seller for past-due rent.

Nu-Way Realty paid the seller the $700 earnest money deposit with the intent to collect the deficient monies from the buyer.

The sale never closed escrow. On February 20, the seller instructed Nu-Way to take steps to evict the buyer from the home. On March 15, the buyer vacated the home.

Rankin did not check on the transaction after she gave the executed purchase/lease agreements to Hunter. She did not disclose to and discuss with the seller Nu-Way Realty's dual agency representation and the possible conflicts of dual agency. She did not inform the seller of the buyer's weak financial position and did not take steps to protect and promote the seller's interests.

Rankin failed to amend the contract terms or to document terms of the buyer's earlier move-in date, and to spell out terms pertaining to the lease, such as who was responsible for collection of the rent; how late payments, if any, would be handled; or how payment or reimbursement for repairs were to be treated.

VIOLATIONS: Rankin violated her fiduciary duty to the seller in violation of A.A.C. R4-28-1101(B). She failed to deal fairly with all parties to a transaction within the meaning of A.A.C. R4-28-1101(A) by failing to disclose and discuss with the seller the dual agency relationship created when Nu-Way Realty represented both buyer and seller.

She failed to perform as expeditiously as possible by failing to follow up on the status of the transaction, in violation of A.A.C. R4-28-1101(C). Her actions constitute violations of the provisions of Arizona Revised Statutes, Title 32, Chapter 20, and the Commissioner's Rules, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Rankin's real estate license suspended, and right of renewal denied, effective October 1, 1997 through June 30, 1998. Upon entry of this Order, Rankin may apply for license renewal and reinstatement pursuant to A.R.S. §§ 32-2130 and 32-2131.

Rankin shall pay a civil penalty in the amount of $500.

A wealth of information awaits you at www.adre.org

Visitors to the Department's Web site at www.adre.org can quickly find a great deal of information about the Department.

Included in the more than 300 web pages are:

- Downloadable licensing forms
- Back issues of the *Arizona Real Estate Bulletin*
- Substantive Policy Statements
- A link to the *Arizona Real Estate Law Book* on-line edition which provides a powerful search engine enabling you to locate specific words or phrases
- A schedule of Broker Audit Clinics for the remainder of 1998 and for 1999
- Maps showing the location of our Phoenix and Tucson offices
- A Department telephone directory
- Information about obtaining or renewing a real estate license
- Instructions for filing a complaint against a real estate licensee
- Information about acquiring property in Sonora, Mexico
- Valuable links to many sites including other government agencies and real estate software sources.

Of interest to many visitors is our Late-Breaking News page which is updated frequently, often daily.

If you have Web access, you owe it to yourself to visit the site often.

Real Estate Recovery Fund eases losses caused by dishonest real estate brokers and salespersons

The Arizona Real Estate Recovery Fund paid nine victims of a fraudulent real estate scheme a total of $40,000 in August, a small fraction of the victims' actual losses.

The payment was ordered by Maricopa County Superior Court Judge Jonathan Schwartz against the license of former real estate broker William A. Carreras. Judgments in nine separate lawsuits were entered between June 1997 and June 1998 against Carreras and another defendant, Paul Weismann.

Carreras and Weismann, a former California resident who was never licensed by the Department, did business as Weismann Equity and solicited funds for the supposed purchase of commercial real estate in the Phoenix area. The property was to be developed into gasoline station/convenience store locations.

The defendants also promised consulting services, feasibility studies and the services of commercial architects. They collected fees from the victims ranging from $5,000 to $10,000 for each of these services.

Carreras and Weismann failed to appear or to defend themselves in any of the lawsuits. The nine victims suffered losses of more than $250,000 including attorneys' fees and court costs. Because the Real Estate Recovery Fund covers a maximum loss of $20,000 per transaction and a maximum of $40,000 per licensee, the victims received only a fraction of their losses. (A.R.S. § 32-2186 *et seq.*)

Although only nine victims applied to the Recovery Fund, information indicates more than 50 individuals were defrauded by the pair to the tune of more than $1 million.

Carreras was indicted earlier this year and pleaded guilty on August 14 to two class 3 felonies for his part in the fraud. He was sentenced to two and a half years in prison, five years probation and ordered to pay $700,000 in restitution to victims. His real estate broker's license was suspended in November 1996 and revoked on April 29, 1997.

Other recent payouts

In February, Pinal County Superior Court Judge William J. O'Neil ordered payment of $20,000 from the Fund to Edna Evans against the license of R. Wayne Proctor. That order has been appealed by the defendant.

Evans' suit, filed in 1991, alleged misrepresentations by Proctor and others to induce her to trade her Mesa residence for vacant land in Eloy and to accept a no-recourse note and deed of trust. Evans was awarded a judgment in October 1997 for actual and punitive damages in excess of $200,000.

Proctor was indicted in 1990 for conspiracy and fraudulent schemes involving real estate along with co-conspirator Robert J. Olson. Olson, who was not licensed by the Department, was also involved in the Evans transaction. Proctor and Olson were convicted in 1996, sentenced to 15.75 years in prison and ordered to pay $3.1 million in restitution to numerous victims. Proctor's real estate broker's license was revoked in November 1992.

Maricopa Superior Court Judge Bethany Hicks recently ordered payment of $12,600 to Larry and Marla Meggers as the result of a suit filed in 1994 against several defendants including former real estate salesperson Jerry J. Olson. Meggers' attorney made application to the Recover Fund in December 1997 after learning that Olson died without assets in 1995, shortly after the judgment was entered.

Meggers' complaint alleged that Olson contacted them in 1992 while their Gilbert home was in foreclosure. He made a series of misrepresentations to convince the Meggers to give him checks totaling $12,000 which they believed would be used to redeem or repurchase their home. Instead, Olson disappeared with their money.

Recovery Fund statistics

The Real Estate Recovery Fund is funded by fees charged those applying for an original license, $20 for each real estate or cemetery broker's license and $10 for each real estate or cemetery salesperson's license.

If, on June 30 of any year, the fund has a balance of less than $600,000, the Department is required to assess each real estate or cemetery broker a $20 fee and each real estate or cemetery salesperson a $10 fee at the time of license renewal.

Between January 1 to December 31, 1997, eight claims totaling $85,841.75 were paid from the fund. As of June 30 of this year, claims totaling $72,600 have been paid. Six applications to the fund are pending in Superior Court.

Legal ramifications of initialing contracts, 'buyer's remorse' and breaking leases

Reprinted from the October 1998 issue of The Legal Advisor, *with permission*

By Thomas R. Aguilera, Esq.

Question: What if the buyer in a real estate transaction doesn't read every line of the contract, but signs it and initials every page? Can't he say, in stunned dismay, "Hey, I never saw that clause, I want out!"?

Answer: No! The signature and the initials at the bottom of the page sure make it look like he read the contract. Right? Right.

For example, let's say the property the buyer purchased was listed as being 3.3 acres. However, 0.3 of those acres was subject to an easement for ingress/egress in favor of the neighbor. Well, the parcel was listed correctly, it just did not state that a portion was actually an easement used by somebody else. Remember line 287 of the AAR Contract? It says that if square footage is important to the buyer, he should check it out during the inspection period. In the example above the buyer can't complain about the easement being included in the square footage calculation. He signed the contract, and if he failed to verify the lot size he will likely have waived his objections.

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Arizona Association of Realtors® survey reveals members' opinions about many issues

Reprinted from the August 1998 issue of Arizona Realtor Digest, *with permission*

According to a new legislative issues study, most Arizona Realtors® think the state should have real estate license reciprocity with other states, liens for commissions should be allowed on clients' property, and completion of high school and an apprenticeship should be required for a license.

In addition, most would favor legislation mandating agency disclosure and identifying the legal relationship of a licensee and a buyer before they agree on the type of agency relationship they will have.

The telephone survey of 510 randomly selected Realtors throughout the state was conducted in June to determine members' opinions on future legislative or regulatory possibilities. The analysis of the results reports statewide response and also breaks the data into three areas: Maricopa County, Pima County, and outlying, or non-metro, areas. Percentages discussed in this article and the profile on page 3 have been rounded.

Agency disclosure

When asked if they would like to see legislation introduced that would mandate agency disclosure to the consumer, 68 percent statewide and in Maricopa County said yes. In Pima County, the percentage in favor was higher: 80 percent. In the non-metropolitan areas of the state, opinions were more evenly divided.

A majority of Realtors statewide, 78 percent (45 percent "strongly"), said they would favor a law identifying the legal relationship of a licensee and a buyer prior to the time they agree on the type of agency relationship they will have (in other words, a "default" relationship). However, only 12 percent more Realtors outside the metro areas liked the idea than those who were opposed.

Statewide, 57 percent do not want to do away with the option of being able to represent both parties in a real estate transaction, while 38 percent are in favor. More Pima County (71 percent) and non-urban practitioners (75 percent) favor having the choice of representing one party in the transaction or both. In Maricopa County, opinions are evenly divided.

Favored by 61 percent across the state is the idea of making the salesperson the actual agent instead of the broker. In Maricopa County, opinions were fairly evenly divided (50 percent in favor, 43 percent against); but in Pima County 72 percent were in favor, and in the outlying areas 95 percent favored the idea.

Brokerage

A majority of those surveyed would change current law that prevents a broker from putting a lien for a real estate commission on a client's property, whether residential or commercial: 83 percent would like that right in commercial transactions, and 84 percent would like it in residential practice.

Seventy-nine percent would make a change in the responsibility brokers have for the actions of affiliated licensees, although they don't agree on the change that should be made. Thirty-seven percent would make licensees totally responsible for their own professional actions, while 41 percent would keep the broker responsible, but only for affiliated licensees' major infractions.

Education, licensing

A state-required real estate apprenticeship and different licenses for different specialties both drew 81 percent support across the state. Regionally, positive responses were consistent, except in the outlying areas on the question of specialty licenses. In those areas where real estate practices may include many types of transactions, there was less support for special licenses.

More than 95 percent of those polled would institute license reciprocity with other states (in the non-metro areas, 100 percent favored reciprocity).

Eighty-three percent would require completion of high school as a condition for licensing. The outlying (99 percent)

Continued on next page

ARIZONA DEPARTMENT OF REAL ESTATE LICENSING STATISTICS

September 17, 1998

REAL ESTATE LICENSEES	Active	Inactive
Associate Broker	4,102	407
Designated Broker	2,539	89
Self-Employed Broker	4,455	485
Salesperson	23,137	8,240
Total	**34,233**	**9,221**

CEMETERY LICENSEES	Active	Inactive
Associate Broker	15	2
Designated Broker	14	3
Self-Employed Broker	2	1
Salesperson	207	104
Total	**238**	**104**

MEMBERSHIP CAMPING LICENSEES	Active	Inactive
Associate Broker	6	0
Designated Broker	8	0
Self-Employed Broker	1	5
Salesperson	83	29
Total	**98**	**34**

ENTITY LICENSEES	Active	Inactive
Real Estate	3,126	872
Cemetery	28	4
Membership Camping	13	1
Total	**3,176**	**877**

Total Number of Licenses	**37,745**	**10,236**
Total, Active and Inactive	**47,981**	

and Pima County (96 percent) areas were more enthusiastic on this point than Maricopa County (75 percent). Other choices were: some high school; two-year or community college degree; accredited vocational technical degree; four-year college/university degree.

Sixty-eight percent oppose the Arizona Department of Real Estate's plan to drop fair housing and environmental courses from the continuing education (C.E.) requirements for license renewal. However, 16 percent aren't sure.

Most Realtors (64 percent) did not like the idea of requiring that C.E. courses be spaced out during the two-year license period instead of allowing the licensee to accrue the C.E. hours whenever it's convenient, as is currently the practice.

Growth issues

A majority (63 percent) think Arizona has had average success handling growth. The consensus statewide is that the status quo is preferable to either of two ways of dealing with urban growth: restricting new development outside currently developed areas garnered only 4 percent and the proposed "Growing Smarter" plan 12 percent.

In Maricopa County 65 percent and in Pima County 47 percent prefer the status quo, with the idea of restricting development outside current areas being the least popular (6 percent in Maricopa and 1 percent in Pima), and 20 and 30 percent, respectively, not sure.

In the outlying areas no votes were cast for restricting development outside current boundaries; 83 percent favor the status quo. Only 2 percent aren't sure about growth solutions. However growth is addressed, Realtors say, don't limit individual property rights in an effort to halt growth. Strongest in the outlying areas (73 percent), this opinion is weaker in the cities (49 percent in Pima County, 53 percent in Maricopa County).

No definite opinion

Among issues that elicited no clear opinion throughout the state were:

• The efficiency of the Arizona Department of Real Estate: about half think changes need to be made in enforcement, but the other half think the Department is doing adequately.

• Number of C.E. hours for license renewal: a little less than half are satisfied with the 24 hours required every two years; about as many think that's either too few or too many, and 14 percent aren't sure.

• Required seller property disclosure: slightly more than half think a seller property disclosure form should be required by law; 45 percent disagree. In the outlying areas, 70 percent would mandate the forms, but only 39 percent in Pima County and 53 percent in Maricopa would do so.

• Agent's minimum duties: statewide and in Maricopa County, about half would oppose law spelling out agents' minimum duties to principals. In the outlying areas, that opinion grows to 72 percent. However, 61 percent in Pima County would put minimum duties in law.

The survey will serve as resource material for the 1999 AAR legislative policy positions, which will be presented for the Board of Directors' approval in October.

The sample of AAR members was weighted by county, based on member population, and gender controlled: 52 percent male, 48 percent female. Maricopa County members comprised 64 percent of the sample; Pima 20 percent; Yavapai 5 percent; Mohave 3 percent; Coconino 2 percent; and the other counties plus or minus 1 percent. Calls were made at all times of the day and evening, on both weekdays and weekends, to avoid omitting any subgroup.

The sample error for the study is plus or minus 3.5 percent at a 90 percent confidence level. The survey firm concluded the sample is highly representative of the AAR membership.

A profile of Arizona Realtors®

What's the picture of Realtors® in the Arizona real estate industry? Chosen at random but based on membership geographic population by county (and gender-controlled), the 510 respondents to the survey published on page 7 are highly representative of the AAR membership. Here's the picture:

Age: Five percent are under 35; 55 percent are 35-44; 39 percent are 46-60.

Race: Ninety-four percent are White; 1 percent are Block; 2 percent are Hispanic; 2 percent are Asian.

Years Licensed: Nine percent have been licensed 1 to 5 years; 32 percent for 6 to 10 years; 38 percent for 11 to 15 years; 20 percent for 16 to 30 years; 1 percent more than 30 years.

Position: Seventeen percent are designated brokers or managers; 35 percent are associate brokers; 48 percent are salespersons.

Specialty: Seventeen percent deal primarily in commercial real estate; 78 percent in residential real estate; 4 percent in raw land; and 1 percent in property management.

Work Schedule: One percent spend 29 hours per week or less in real estate; 2 percent spend 30 to 39 hours; 49 percent spend 40 to 49 hours and 48 percent spend more than 50 hours.

Gross Income: Four percent make less than $25,000 per year from real estate related activities; 13 percent make $26,000 to $50,000; 41 percent make $51,000 to $75,000; 40 percent make $76,000 to $100,000 and 2 percent make $101,000 to $150,000.

Family Income: Nine percent reported a combined family income (CFI) of less than $50,000; 39 percent have a CFI of $51,000 to $75,000; 29 percent have a CFI of $76,000 to $100,000 and 1 percent reported a CFI greater than $200,000.

Political Party: Sixty-one percent are Republicans; 30 percent Democrats; 1 percent Libertarian; 7 percent other party registrations and 1 percent are not registered.

School founder Rex Denham dead at 65

Rex Denham, owner and director of Northwestern School of Real Estate, died Sept. 25 in Las Vegas.

A graduate of Oklahoma State University and the Oklahoma School of Banking, he became assistant vice president and manager of MeraBank in Bullhead City prior to establishing the real estate school in 1987.

He was a member of Board of Realtors® in Bullhead City, Kingman and Lake Havasu City.

What every broker should know about the care and feeding of a trust account

by Lynda Gottfried

For many real estate brokers, trust accounting is a complicated and foreign experience. They tend to procrastinate and hope it will go away. This only complicates the problem. The Designated broker (hereafter referred to as the broker) bears the ultimate responsibility for all trust account funds and record keeping. Brokers should have a good knowledge and understanding of the requirements and reports even when they hire accountants, bookkeepers and employees to do the work on their behalf. A.R.S. §§ 32-2151 and 32-2174 apply to trust accounts and related records.

Basic Requirements

Brokers are required to maintain a complete record of all monies received. Records must be kept in accordance with generally accepted accounting principles. Brokers may choose to handle trust accounting either manually or by computer. If records are being done manually, ledger books, index cards, columnar paper and other similar methods are acceptable. If records are being done by computer, the computer software chosen should be determined by the simplicity or sophistication and volume of the broker's business requirements and activities.

No matter which method of accounting is used, the broker's records must include a properly descriptive receipts and disbursement journal (commonly known as a checkbook or check register) AND client ledger (an individual breakdown of the funds held for each party such as each owner, tenant, buyer). One of the more common violations is not maintaining client ledgers.

Computerized records

If trust account record keeping is by computer software, most programs will include both receipts and disbursements journals and client ledgers. Since both are required, it is recommended that this be considered when purchasing a trust account software program. If trust account records are computerized, the broker is responsible to keep them in a manner which will allow for reconstruction in the event of data loss. The Department suggests that the broker back-up computerized records daily and keep the copy off-site, at home or in a safe-deposit box.

What will Department auditors look for?

For every deposit, withdrawal, transfer and check there must be a record. Deposit slips must be descriptive including the date, amount and names of parties to the transaction. In the case of computerized trust account records for property management, names of parties to the deposit are not required to be on the deposit slip if the computer program provides the necessary information for each deposit.

In the case of property management funds, if the broker and owner agree, money can be deposited directly to the owner's account. If this is the case, the broker is not required to have a trust account; however the broker and their licensees and employees are not to have any access to the owner's account.

Reconcilliation

Brokers are required to maintain a trust account reconciliation and client ledger balance on a monthly basis. In many cases when a broker has a shortage or unacceptable overage in their trust account, they have not reconciled the account on a monthly basis. One of the most prudent methods of catching and correcting any bank or employee error is by monthly reconciliation.

In most cases when an employee has converted or embezzled funds from a trust account, the broker has had no involvement in or knowledge of the monthly reconciliation process.

Trust account reconciliation is a two part process (many computer software programs will handle this process). One part is the bank statement and the receipts and disbursements journal. The second part is the adjusted balance and the client ledger balance. As with any bank account, a statement is received from the banking institution. It will reflect all activity within the account for the given period, usually monthly.

In most cases not every check written clears the bank within the same period. Other adjustments maybe required. Any checks written and not cleared must be accounted for, as are any deposits, transfers and withdrawals. There will be adjustments needed for such things as interest, bank charges and returned items to the account. By taking the bank statement balance, subtracting outstanding checks and disbursements, adding outstanding deposits and receipts and offsetting the necessary adjustments, an adjusted balance is determined. This should be the balance in the broker's receipts and disbursements journal for the same date as the ending date on the bank statement.

If the adjusted balances are not the same, an overage or shortage exists. The adjusted balance should then be compared to the client ledger balance. It too should be the same, or an overage or shortage exists. All three balances should be the same amount. When they are not, research should be done to determine the error or problem.

When this is done promptly, it is easier to find the error or problem. When it is left undone or is not resolved, the correction becomes more serious and complicated. By comparing the three figures, fraudulent action is easier to determine. For example, the receipts and disbursements journal and bank statement could be in balance and reconciled; however the broker could owe more money to clients than the broker has in the trust account. This usually is a sign of errors, commingling, conversion of funds or other violations.

Extra funds in an account

The broker may have monies, not to exceed five hundred dollars, in a trust account for such things as bank charges and minimum balances. This is not considered commingling. If interest is earned on a trust account, the funds must be removed at least once every twelve months. If interest is to be retained by the broker (with written authorization such as in a property management agreement) interest which puts the broker over the five hundred dollar amount would have to be removed more frequently. At all times, the broker should maintain a record of all broker funds and transactions and include the balance in each monthly reconciliation.

Who can sign the checks?

Under certain circumstances, a broker may choose to add other parties as an

Continued on next page

authorized signatory on a trust account. If a trust account is used for property management only, the broker may authorize a licensee under that broker's license or an unlicensed person in their direct employ to have signatory authority.

If the person is an unlicensed person, they must be a bona fide officer, member, principal or employee of the property management firm. If the trust account is used for sales/earnest or any other combination of uses, the broker may only grant signatory authority to a licensee under that broker's license. Of course, the broker remains responsible and potentially liable for any money handled by others.

Record retention

Records related to property management trust accounts must be maintained by the broker for a period of three years. This includes bank statements, canceled checks, receipts and disbursement journals, and all other related records. Records related to sales and other real estate transactions are to be kept for a period of five years. As a result, trust account records for these areas are also required to be maintained for the five year period. In the event that a trust account is used, for example, for property management and sales, the five year record keeping rule applies.

The bottom line . . .

When bearing the responsibility of managing other people's money, prompt, accurate trust accounting is not only prudent, but is required.

Lynda Gottfried is the Audit Supervisor for the Department's Auditing and Investigations Division and is based in the Tucson office.

You can earn continuing education credit at the November NAR Convention

The following courses, to be presented at the National Association of Realtors® convention in Anaheim, Calif. on November 7-9, are approved by the Department for three hours' continuing education credit for Arizona real estate licensees in the indicated categories:

"Advanced Buyer Agency Skills" — Agency

"The Appraiser as an Expert Witness" — General

"1997 Tax Reform Impact on Home Buyers/Owners" — Real Estate Law

"The case of Ostrich Real Estate: We Know Which End is Up!" — General

"Gain the Legal/Technological Advantage:
Where Electronic Commerce
and the Real Estate Transaction Intersect" — General

Be sure to retain the proof of attendance issued by NAR to document hours claimed for license renewal.

75 million now have Internet access

Here are some interesting Internet demographics from a recent marketing study as reported in *PC Computing* magazine:

• An estimated 75 million people are now connected to the Web.

• The average surfer is 36 years old, with a household income of $53,000.

• More than half of Web surfers earn in excess of $50,000 a year.

• About half are married .

• About $3.3 billion was spent online last year.

• Another $4.2 billion was spent after having done research for the purchase online.

• 71% of the people go online to research products and services as opposed to using a local directory, up from 47% in 1997.

• The main reasons surfers mention for leaving a site: slow loading pages and hard-to-find information.

1998-1999 Arizona Real Estate Law Book scheduled for publication in January

The 1998-1999 edition of the *Arizona Real Estate Law Book* will be published in January and will be available at our Phoenix and Tucson offices, and by mail.

The new edition will contain one amendment made by the 1997 Legislature to the real estate statutes, extensive changes to the Administrative Procedures Act, and the revised Commissioner's Rules.

"Publication has been delayed until the revisions to the Commissioner's Rules rules have been approved," said Commissioner Jerry Holt. "It's very important that licensees obtain this new Law Book and familiarize themselves with the rule changes."

At the time the new edition is published, the on-line edition, which can be found on the Internet through the Department's Web pages at www.adre.org, will also be revised. The on-line version includes a powerful search engine which enables a user to search for words or text strings and find every instance of the word or string in the publication. The Department plans to offer the on-line edition, including the search engine, on floppy disks.

An order form for the 1998-1999 *Law Book* will be published in the December issue of the *Arizona Real Estate Bulletin*, on the Department's Web site, and through our Fax Response Service. Details will be published in the December issue of the *Arizona Real Estate Bulletin*.

Perils of recording aborted contract

Continued from page 3

Recorder's Office with one of these: "Since this is a .44 magnum pointed at your head, the most powerful handgun in the world, and would blow your head clean off if you guess wrong, you really got to ask yourself, "do I feel lucky?""

J. Robert Eckley is a Realtor and real estate, agency and construction litigation attorney with a multi-state practice.

Rule changes

Continued from page 1

A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

The Department is encouraged that personnel take an active role in writing, analyzing, and continuously reviewing the contents of the rules.

Through this continuous appraisal, the Department has made the following changes:

R4-28-101(8) The term "lot" was moved from after "including" to before "parcel."

R4-28-102(B) The Department is concerned that two sets of standards will exist, and confusion will result, if the "less than 11 days" time period excluding Saturdays, Sundays, and legal holidays time period is kept in the rulemaking. This time period would have counted only "work days" while the primary computation of time counted calendar days.

R4-28-103(B)(3) Because of the volume of information contained in some of the applications, it is counterproductive for the Department to hold open an application if the applicant fails to submit missing information. By changing "may" to "shall" the Department is removing its responsibility to expend additional employee time to continue tracking and handling deficient applications which have not been corrected. "Unless the applicant requests an extension" was added at the end of the sentence. As the last sentence states, the applicant still has the opportunity to refile an application When the missing information is acquired. The location of the timeframe matrix was changed from subsection (D) to Table 1.

Table 1 When the Department reviewed and analyzed its internal process, it became apparent that when a broker submits a completed branch office application, the license is automatically issued and no other criteria or substantive review is necessary. Therefore, this time-frame has been removed from the table. The substantive completeness review and the additional information period were inadvertently omitted from a temporary cemetery salesperson's license. The correct time-frames of 90/60 days (which are the same as the temporary broker license and membership camping certificate of convenience) have been added to the table. The Department inadvertently omitted the additional information period from the school and instructors' approval. The correct time-frame of 15 days has been added. The Department also added appropriate rule numbers in the authority column.

R4-28-104(B) The intent of this Section was to include all license fees, even those prescribed by statute. The timeshare exemption fee of $300, and the new and amended cemetery certificate of authority fees of $500 were omitted and have been added.

R4-28-104(C) This subsection infers that a fee is being charged for an inspection. This is not true. The fee is based upon statutory authorities, A.R.S. §§ 32-2182, 32-2194.02, 32-2195.02, 32-2197.05, and 32-2198.04, which requires that the subdivider be responsible for the total cost of travel and subsistence expenses incurred by the department in the inspection. The Department has changed this subsection accordingly.

R4-28-301(A)(1) and (A)(2) The Department did not intend to require repetitive disclosure of information and the phrase "if not already provided on earlier applications" was added to R4-28-303(A)(2), License Renewal; Reinstatement; License Change.

R4-28-301(A)(1)(e) The Department is not going to decide before the fact whether an applicant or licensee is guilty of a pending charge. The phrase "[I]f the applicant has any formal charges pending" has been removed.

R4-28-302(B)(2)(a), (C)(2) and (D)(2) The Department of Economic Security (DES) requires that all agencies issuing licenses request every applicant to provide their Social Security Number. This requirement allows DES to track a "deadbeat" parent. When an entity applies for a license, individual social security numbers are not involved, but a federal tax identification number distinguishes the business. Recently DES has 'indicated that requesting the federal tax identification number of an entity goes beyond the intent of the legislation. Therefore, the Department has removed this requirement from the rulemaking.

R4-28-302(B)(2)(e) The previous subsections (e) and (f) requiring Articles of Incorporation and Articles of Organization have been replaced with "[A] copy of the registration application stamped 'Received and Filed' by the Secretary of State."

R4-28-302(H)(I) "Supervise a salesperson's or broker's business activity and be" has been deleted. "Be" has been inserted before "responsible," "supervising" has been inserted after "for," and "the acts of" has been deleted.

R4-28-303(A)(2) The Department did not intend to require repetitive disclosure of information. The phrase "in addition to the requirements in R4-28-301(A)" and "if not already provided on earlier applications" has been deleted and a new subsection (e) has been added to require a completed Certification Questionnaire and all supporting documents when not previously disclosed.

R4-28-303(B)(1) through (B)(4) This information is already contained on the renewal application. There is no need for the applicant to provide this information. Subsections (B)(1) through (B)(4) have been removed.

R4-28-303(E)(1)(b) and (F)(2)(b) Allowing cemetery or membership camping salespersons or associate brokers to be professional corporations or professional limited liability companies is inconsistent with A.R.S. § 32-2125(B). "Cemetery or membership camping" and "as applicable" has been deleted.

R4-28-303(G)(1)(b) To reduce the number of Administrative Severance Requests deemed incomplete because the applicant has failed to provide a stamped envelope pre-addressed to the broker, the Department has determined it will simplify the process by removing this requirement from this subsection.

R4-28-40 1.01 (A)(1) Fair housing has been included as a mandatory category.

R4-28-403(C)(6) The internship program, while a good idea, needs to be further de-

fined if there is a requirement. "1 year of supervised internship with a school approved by the Department and at least" has been deleted.

R4-28-403(D)(1) Requiring that a school keep the address of all students when those addresses change often is not practical. "And address" has been deleted.

R4-28-502(I) The referenced subsections, (F) and (G), should have been (E) and (F) and have been changed accordingly.

R4-28-503(A) The words "or leasing" were added to this subsection early in the rulemaking process but, based on subsequent public comment, the phrase has been removed.

R4-28-503(B) The Department has incorporated the restrictions found in the current substantive policy statement concerning when "free" can be used in advertising. The phrase "If the offer is without condition the term 'free' or other similar term may be used." is unnecessary and has been deleted. (1) all conditions for the receipt of the premium are fully, clearly, boldly and unambiguously stated in the advertising; (2) an expiration date for the offer is stated; and (3) the offer complies with A.A.C. R4-28-1101(G), Real Estate Settlement Procedures Act (RESPA) and any other applicable real estate and other laws.

R4-28-504(E) Subsection (E)(3), clarifying construction improvements, provided the stakeholder with information but was not a requirement and has been deleted.

R4-28-701 The term "compensation" is necessary in this Section. The phrase "a portion of the commission" has been changed to "compensation." In order to include disclosure of all persons being compensated, including the licensee, the word "other" has been deleted. The word "person" has been replaced with "licensee" to clarify that disclosure of rebates to principals are not required. The time of the disclosure is confirmed with the addition of the phrase "before or at the close of escrow."

R4-28-802(A) The Arizona Association of Realtors® is concerned that principals or parties receive appropriate copies, not individual persons. AAR requests that "Person" is deleted and replaced with "party." The change has been made.

R4-28-803(A), (B) and (D) "Property interest" was defined in R4-28-101(8) to include all of the various types of real estate interests. Since the term "lot" is included in that definition, the term "property interest" is more correct for these subsections and has been changed accordingly.

R4-28-1101 (E) The phrase "or concurrent with" has been deleted.

R4-28-A1201(C)(1) The Department does not need a copy of the Articles of Incorporation in this instance and has removed this requirement from the subsection.

R4-28-AI2OI(C)(3) A corporation does not have a social security number and requiring the tax identification number from a licensed entity exceeds the intent of A.R.S. § 25-320(L) to collect child support from a "deadbeat" parent.

R4-28-A1211 (B)(5) The first sentence has been changed as follows: "The municipal or county government shall prohibit occupancy and the subdivider shall not close escrow on lots sold in the subdivision until all proposed or promised subdivision improvements are complete."

R4-28-A1211(B)(5)(b) This subsection was rewritten as follows: "The subdivider shall submit a written statement that no escrow shall close on any lot until all subdivision improvements are complete."

R4-28-B1201 (A)(1)(b) The citation is incorrect and should be § 32-2181 et seq. which refers to the information and documentation required for the public report.

R4-28-B1210(3) After further consideration and discussion, requiring a Certificate of Occupancy program or its equivalent doesn't fit within this Section and has been removed.

R4-28-1307 The words "or law" have been added after "question of fact" and "or" has been changed to "and" after "costs or delay."

R4-28-1310(D) 1998 legislation (A.R.S. § 41-1092.09(D), changed the filing time for response to 15 days from the request. This subsection reflects that change.

R4-28-1310(E) Based on A.R.S. § 41-1092.09(D), "[T]he Commissioner shall issue a ruling on the request within 15 days after receipt of the request," thus, that has been removed from this subsection.

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In Arizona there is a presumption that after you sign a contract you are "presumed" to have read it all of it. This might seem a bit harsh and lead a buyer to feel that he didn't get what he wanted and now can't do anything about it. But when a limitation of this sort is expressly written into a contract, a court will likely enforce it.

Now, courts in Arizona are known to look to the "intentions" of the parties to a contract. This is called looking into "parole evidence" to give meaning to the intent of the signors. But, it seems clear that as a real estate professional you should inform your buyers, and sellers, that once they put their John Hancock on the contract, the law will presume they read it.

Buyer's remorse is never an excuse

Buying a home is a big decision. Let's say you are the buyer's agent. What do you do if the buyer gets cold feet? What do you do if the purchase agreement has been signed, the seller has done everything required, and the buyer comes to you and says she just cannot go through with the transaction? You are likely the person the buyer will ask whether she has to complete the purchase.

A mere change of heart such as this is sometimes described as "buyer's remorse," and it is never an adequate legal justification for canceling a purchase contract. If the buyer does not sign the closing documents, she breaches the contract. If the buyer does not have a valid legal justification for the breach, (and a change of heart isn't one), the seller has the right to enforce the contract through a doctrine called "specific performance." This means a court will force the party in breach to perform its part of the deal. Arizona recognizes there are valid reasons for refusing to close. The following are examples of legally justifiable reasons for not closing a transaction:

• *Failure to Comply with the Statute of Frauds:* Any contract for the sale of land must be in writing.

• *The Contract is Illegal:* If a contract is made for an illegal purpose, such as theft or a drug deal, courts will not enforce it.

• *One of the Parties is Incapable of Making a Contract:* If one party is incapable of validly contracting, such as by reason of insanity, the contract will not be enforced.

• *Mistake By All Parties:* If the written

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contract does not express what the parties really had in mind when they negotiated the contract, the parties may cancel it. Give us a call and we will tell you about the famous "Barren Cow" case.

• *Unconscionability/Duress:* If a contract is induced by force or is so one-sided as to appear completely unfair to one party, a court may choose not to enforce it.

• *Fraud:* If one party used fraud, deceit, or misrepresentation to induce the other to sign, the contract may be canceled.

• *Breach by the Other Party:* If one party breaches a contract before closing, the other party has the right to cancel the contract.

Beyond the fact that courts will enforce a contract if a party wrongfully breaches it, damages will sometimes be awarded to the non-breaching party. For example, if a seller buys a new house and the buyer unjustifiably backs out of buying the old one, the buyer may be liable for the money the seller spent on her new home. A breaching party may also be liable for attorney's fees and costs incurred in the lawsuit. Also note that if the contract provides for it, a seller may keep the earnest money even if the contract is canceled.

Finally, and perhaps most important to you, if an agent incorrectly advises a buyer that she may breach the contract, that agent may commit a tort called "interference with contract" and could wind up being liable for the seller's damages.

Can the potential buyer of a home legally break a lease?

Recently, many agents have asked me the following question: "Isn't it true that a lease can be broken so long as the reason is that the tenant is going to buy real property or is being transferred for employment reasons?"

The answer is simple: "Sorry, no such law." Now, if your buyer is in the military and is being transferred, that's another story. Leases can be broken li without penalty to the tenant in those limited instances. The notion that buying real property is legal justification for breaking a lease is merely an urban legend.

Mr. Aguilera, a member of the law firm of Monroe & Associates in Tucson, practices real estate law, general business law and restaurant and liquor license issues.

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